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No. 06-1431 1-3-08

IN THE
# Supreme Court of the United States

CBOCS WEST, INC.,
*Petitioner*,

v.

HEDRICK G. HUMPHRIES,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 5

I. IN ENACTING THE CIVIL RIGHTS ACT OF 1991, CONGRESS RATIFIED THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981 ..... 5

A. The Unanimous Rule at the Time of the 1991 Act Was That the Private Right of Action Under § 1981 Included Retaliation ..... 5

1. Sections 1981 and 1982 derive from a single sentence in § 1 of the 1866 Act ..... 6

2. *Runyon* held that § 1981 and § 1982 must be construed in parallel where the operative words are common to the 1866 Act ..... 8

3. *Sullivan*'s holding applies with equal force to § 1982 and § 1981 ..... 11

4. At the time of the 1991 Act, the circuit courts unanimously recognized a cause of action for retaliation under § 1981 in reliance on *Sullivan* and *Runyon* ..... 13

5. *Patterson* narrowed the substantive coverage of § 1981, not the scope of the private right of action ..... 15

B. In the 1991 Act, Congress Both Overruled *Patterson* To Make § 1981 Applicable to Post-Formation Conduct and Affirmed the Cause of Action for Retaliation ..... 17

II. OTHER STATUTES PROHIBITING RETALIATION, INCLUDING TITLE VII, DO NOT CAST DOUBT ON THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981 ..... 22

A. Title VII Did Not Supplant or Repeal Any Portion of § 1981 ..... 22

B. The Adoption of Express Private Rights of Action in Other Statutes Does Not Undermine the Implied Private Right of Action Under § 1981 ..... 25

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

Page

CASES

*Bragdon v. Abbott*, 524 U.S. 624 (1998) ..... 18

*Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) ..... 27

*Cannon v. University of Chicago*, 441 U.S. 677 (1979) ..... 19, 20

*Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990) ..... 16

*Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38 (2d Cir. 1984) ..... 14, 15

*Cort v. Ash*, 422 U.S. 66 (1975) ..... 19

*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) ..... 26

*Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982) ..... 14

*Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990) ..... 16

*Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) ..... 24

*Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) ..... 4, 5, 12, 13

*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ..... 22

*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) ..... 9, 10, 26

*Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) ..... 14

*Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) ..... 17

*Lorillard v. Pons*, 434 U.S. 575 (1978) ..... 18, 27

*Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980) ..... 24

*McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) ..... 16

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) ..... 4, 19, 20, 25

*NLRB v. Scrivener*, 405 U.S. 117 (1972) ..... 28

*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ..... 3, 5, 10, 15, 16, 17, 18, 19, 21, 25, 26

*Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. Unit B 1982) ..... 14

*Posadas v. National City Bank*, 296 U.S. 497 (1936) ..... 24

*Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) ..... 23

*Runyon v. McCrary*, 427 U.S. 160 (1976) ..... 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19

*Setser v. Novack Inv. Co.*, 638 F.2d 1137, *vacated in part on reh'g*, 657 F.2d 962 (8th Cir. 1981) ..... 14

*Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990) ..... 16

*Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979) ..... 24

*Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) ..... 4

*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) .....2, 3, 4, 5, 10, 11, 12, 13, 14, 15

*Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973) ..... 9

*United States v. Borden Co.*, 308 U.S. 188 (1939) ..... 24

*Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993) ..... 18

*Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977).....14, 15

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Amend. XIII ..... 6, 8, 9

Amend. XIV ..... 7, 8, 9

Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (Civil Rights Act of 1866) .....1, 2, 6, 7, 8, 9, 10, 12, 26, 27

§ 1, 14 Stat. 27 .....2, 6, 7, 8, 9, 10, 26

Act of June 27, 1866, ch. 140, 14 Stat. 74..... 8

§ 1, 14 Stat. 74 ..... 8

§ 2, 14 Stat. 75 ..... 8

Act of May 31, 1870, ch. 114, 16 Stat. 140 (Enforcement Act)..... 7, 8, 9

§ 16, 16 Stat. 144 ..... 7, 8

§ 18, 16 Stat. 144 ..... 8

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 ..... 27

Preamble, 108 Stat. 745 ..... 27

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ..... 26

29 U.S.C. § 623(d) ..... 26

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ..... 26

42 U.S.C. § 12203(a) ..... 26

42 U.S.C. § 12203(b) ..... 26

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 ..... 4

Title VII, 42 U.S.C. § 2000e *et seq.* ..... 4, 22, 23, 24, 26

42 U.S.C. § 2000e(b) ..... 23

42 U.S.C. § 2000e-3(a) ..... 26

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 2, 3, 4, 5, 6, 13, 17, 19, 20, 21, 27

Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ..... 26

29 U.S.C. § 215(a)(3) ..... 26

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ..... 26

29 U.S.C. § 2615 ..... 26

National Labor Relations Act, 29 U.S.C. § 151 et seq. ..... 27, 28

29 U.S.C. § 158(a)(4) ..... 27

Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983) ..... 27, 28

49 U.S.C. § 31105 ..... 27, 28

Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ..... 26

38 U.S.C. § 4311(b) ..... 26

Rev. Stat.:

§ 1977 ..... 8

§ 1978 ..... 8, 9

§ 5596 ..... 8

42 U.S.C. § 1981 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

42 U.S.C. § 1981(a) ..... 18

42 U.S.C. § 1981(b) ..... 17, 18

42 U.S.C. § 1981(c) ..... 17, 19

42 U.S.C. § 1981a(b)(4) ..... 23

42 U.S.C. § 1982 ..... 2, 3, 5, 6, 7, 8, 9, 10, 11, 12

Sup. Ct. R. 37.6 ..... 1

LEGISLATIVE MATERIALS

Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) ..... 26

118 Cong. Rec. 3371-72 (1972) ..... 22

H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137 ..... 22

H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 ..... 21, 23

ADMINISTRATIVE MATERIALS

General Accounting Office, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce* (June 2000), *available at* http://www.gao.gov/new.items/he00076.pdf ..... 24

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Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 Cornell L. Rev. 596 (1988) ..... 23

William N. Eskridge, Jr. et al., *Legislation: Statutes and the Creation of Public Policy* (3d ed. 2001) ..... 21

Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565 (1989) ..... 27

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are Members of Congress[2] who are committed to the protection of civil rights through the enactment and vigorous enforcement of civil rights laws like 42 U.S.C. § 1981. The sweeping language of § 1981, enacted as part of the Civil Rights Act of 1866 ("1866 Act"), was designed to protect the contract and property rights of newly freed slaves. The 1866 Act was a broad and historic statement of equality that has been interpreted by the courts to provide mechanisms for effective enforcement of its guarantees. The courts have thus recognized that, as under other civil rights statutes, protection against retaliation – sanctions imposed on individuals who complain about alleged discriminatory treatment of themselves or others – is critical to effective enforcement of the statute. Without this protection, unlawful race discrimination would go unreported and unremedied, and the core purpose of the statute would be defeated.

*Amici* legislate against the backdrop of existing judicial interpretation and rely upon the courts, in application of the principle of *stare decicis*, to adhere to existing precedent when interpreting congressional action. That principle is squarely implicated

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Respondent has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of petitioner has been filed with the Clerk.

[2] The 65 Members of Congress who are joining this brief are listed in the appendix.

**here, because, when Congress amended § 1981 by passing the Civil Rights Act of 1991, the right to sue for retaliation under § 1981 was firmly established by the courts. Congress did not alter that judicial interpretation, and the Court should give effect to Congress's decision to preserve the existing cause of action for retaliation under § 1981 by affirming the judgment below.**

## INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, an African-American man, was fired from his job and alleged (and proffered evidence to show) that the firing was based on (1) race-based animus against him and (2) complaints he raised about race-based discrimination against himself and a co-worker who is an African-American woman. Section 1981 of Title 42, United States Code, protects the right "to make and enforce contracts" free from racial discrimination. That a race-based firing gives rise to a private right of action under § 1981 is conceded. The question presented is whether an individual may maintain an action under § 1981 if he has suffered a sanction – retaliation – for *complaining about* race-based discrimination in employment or another contractual context.

This Court effectively resolved that question in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), when it held that an individual expelled from a community park association as a result of his "trying to vindicate the rights of minorities protected by § 1982" had a cause of action under that statute. *Id.* at 237. The Court also has made clear that, because both § 1981 and § 1982 derive from § 1 of the Civil Rights Act of 1866 ("1866 Act"), the Court's construction of the implied private right of action under

§ 1982 applies equally to § 1981. *See Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976).

Prior to Congress's amendment of § 1981 in the Civil Rights Act of 1991 ("1991 Act"), the courts of appeals had uniformly ruled, relying on *Sullivan* and *Runyon*, that § 1981 provides a cause of action for retaliation. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not alter the scope of that private right of action. In particular, *Patterson* did not cast doubt on either *Sullivan*'s holding that the private right of action under § 1982 extends to retaliation or *Runyon*'s holding that the private right of action implied under § 1981 must have the same scope as the private right of action implied under § 1982. Rather, *Patterson* had the effect of eliminating many retaliation claims by construing narrowly the type of contract-related conduct that fell within the *substantive* ambit of § 1981, holding that the right "to make and enforce contracts" free from racial discrimination did not include conduct occurring after the formation of a contract. Thus, under *Patterson*, because post-formation conduct (like race-based harassment of an employee) did not substantively violate the statute, an individual whose claim of retaliation was based on post-formation conduct had no cause of action. Retaliation claims involving the making or enforcement of a contract, however, were still viable after *Patterson*.

Against this backdrop, the 1991 Act unambiguously confirmed that § 1981 provides a private right of action for retaliation. In the Act, Congress legislatively overruled *Patterson* by including post-formation conduct within the definition of "mak[ing] and enforc[ing] contracts." As a result, in a situation where (as here) an African-American suffers

workplace discrimination because of his race, he is covered by § 1981. Congress did nothing to alter the broad equal rights language under which courts had unanimously implied a private right of action for retaliation. Accordingly, Congress ratified the law recognizing retaliation claims under § 1981. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982). Under *Sullivan* and the unanimous circuit court precedent that Congress ratified in the 1991 Act, retaliation against an individual who complains about alleged conduct that violates § 1981 is covered. *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176-77 (2005). To overrule *Sullivan* and to remove an implied private right of action on which Congress relied would flout both congressional intent and principles of *stare decisis*, which have their greatest force in circumstances like these.

Neither the availability of a remedy for retaliation under Title VII of the Civil Rights Act of 1964, nor the enactment of express private rights of action for retaliation in other statutes, supports Petitioner's argument. Nothing in Title VII impliedly repealed the long-recognized cause of action for retaliation under § 1981. And, because the private right of action under § 1981 is implied, not express, and had been construed to include a cause of action for retaliation, Congress's failure in 1991 to adopt an express private right of action – either for retaliation or for any other violation of § 1981 – provides no evidence of intent to limit or abolish any cause of action under that statute.

## ARGUMENT

### I. IN ENACTING THE CIVIL RIGHTS ACT OF 1991, CONGRESS RATIFIED THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981

Prior to 1991, unanimous court of appeals precedent recognized a private right of action for retaliation under § 1981 in reliance on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Runyon v. McCrary*, 427 U.S. 160 (1976), cases that still control. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), eliminated a category of retaliation claims *not* by changing the scope of that private right of action, but by altering the *substantive coverage* of § 1981 to exclude post-formation conduct.

In the Civil Rights Act of 1991 ("1991 Act"), Congress restored the statute's coverage of post-formation conduct without changing the provision of § 1981 under which courts had uniformly implied a cause of action for retaliation. Under this Court's well-settled principles of statutory construction, Congress thereby ratified the existing judicial interpretation. The legislative history of the 1991 Act confirms Congress's understanding that it was ratifying the pre-existing judicial interpretation of § 1981 to cover claims of retaliation.

#### A. The Unanimous Rule at the Time of the 1991 Act Was That the Private Right of Action Under § 1981 Included Retaliation

In *Sullivan*, this Court held that the private right of action under 42 U.S.C. § 1982 encompassed claims for retaliation. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) ("[I]n *Sullivan* we interpreted [§ 1982] . . . to cover retaliation against those who advocate the rights of groups protected by

that prohibition."). In *Runyon*, the Court confirmed that, because "both § 1981 and § 1982 derive" from § 1 of the Civil Rights Act of 1866 ("1866 Act"), a "consistent interpretation of the law necessarily requires the conclusion that § 1981 [must be construed] like § 1982." 427 U.S. at 170, 173. Accordingly, prior to the 1991 Act, the circuit courts uniformly and correctly interpreted the private right of action under § 1981 to include retaliation for complaints about race-based discrimination in contracting.

*1. Sections 1981 and 1982 derive from a single sentence in § 1 of the 1866 Act*

The provisions currently codified in § 1981 and § 1982 were originally enacted together, pursuant to the Thirteenth Amendment, *see Runyon*, 427 U.S. at 170, as § 1 of the 1866 Act. That section provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to

> like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[3]

Thus, § 1 of the 1866 Act enumerated a series of rights – including the right "to make and enforce contracts," now codified in § 1981, and the right "to inherit, purchase, lease, sell, hold, and convey real and personal property," now codified in § 1982 – in a *single sentence* declaring that people "of every race and color" shall enjoy the enumerated rights to the same extent as white citizens.

On May 31, 1870, Congress enacted what is known as the Enforcement Act (sometimes called the Voting Rights Act) ("1870 Act"),[4] which contained two provisions relevant to consideration of the 1866 Act. First, § 16 of the 1870 Act provided, in relevant part:

> That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

16 Stat. 144. This provision, enacted pursuant to the recently adopted Fourteenth Amendment, tracked the language of § 1 of the 1866 Act. Section 16 of the Enforcement Act, however, applied to "all persons within the jurisdiction of the United States," rather

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[3] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27. The underlined portion makes up the relevant portions of § 1981 and § 1982.

[4] *See* Act of May 31, 1870, ch. 114, 16 Stat. 140.

than just citizens, and omitted in the list of enumerated rights those relating to real and personal property. The intended effects of these alterations were unclear, because § 18 of the 1870 Act "re-enacted" the 1866 Act *in its entirety* and provided that § 16 of the 1870 Act "shall be enforced according to the provisions of said [1866] Act." *Id.*

Meanwhile, by Act of June 27, 1866,[5] Congress appointed a group of commissioners "to revise, simplify, arrange, and consolidate all statutes of the United States." § 1, 14 Stat. 74. Specifically, the commissioners were charged with "bring[ing] together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments." *Id.* § 2, 14 Stat. 75. By 1873, the Revisers had completed their work, and on June 22, 1874, Congress enacted the codified Revised Statutes into law, while simultaneously repealing all of the previous, non-codified versions. *See* Rev. Stat. § 5596. In the new Revised Statutes, § 1977 (which became 42 U.S.C. § 1981) read as did § 16 of the 1870 Act, and § 1978 read as does the current 42 U.S.C. § 1982. The Revised Statutes, however, gave no indication that any part of § 1 of the 1866 Act was intended to be repealed.

*2.* Runyon *held that § 1981 and § 1982 must be construed in parallel where the operative words are common to the 1866 Act*

More than a century later, in *Runyon v. McCrary*, the question arose whether Rev. Stat. § 1977, now § 1981, embodied § 1 of the 1866 Act (the Thirteenth Amendment statute) or § 16 of the 1870 Act (the Fourteenth Amendment statute), or both.

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[5] *See* Act of June 27, 1866, ch. 140, 14 Stat. 74.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court had ruled that Rev. Stat. § 1978, now § 1982, derived from the 1866 Act and prohibited not only discrimination through state action, but also private acts of discrimination. *Runyon* presented the same question with respect to § 1981. Thus, as Justice White noted in dissent in *Runyon*, "[o]ne of the major issues in this case plainly is whether the construction in *Jones v. Alfred H. Mayer Co.* placed on similar language contained in 42 U.S.C. § 1982 . . . prevents this Court from independently construing the language in 42 U.S.C. § 1981." 427 U.S. at 195 n.5 (White, J., dissenting) (citation omitted). After reviewing the history outlined above, the Court held (as it had previously suggested) that "'[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27.'" *Id.* at 171 (quoting *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439 (1973)) (alteration in original).[6] Therefore,

> [a]s the Court indicated in *Jones*, [392 U.S.] at 441-443, n. 78, [its] holding necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination. The statutory holding in *Jones* was that the "[1866] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of

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[6] Resolution of that issue was necessary to the result, as Justice White, in dissent, argued that § 1981 did not derive from § 1 of the 1866 Act (the Thirteenth Amendment statute), but rather solely from the 1870 Act (the Fourteenth Amendment statute). The Fourteenth Amendment applies only to state action.

> law, with respect to the rights enumerated therein – including the right to purchase or lease property," 392 U.S. at 436. One of the "rights enumerated" in § 1 is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 14 Stat. 27.

*Id.* at 170 (fourth alteration and ellipses in original, parallel citations omitted). Accordingly, the Court held, the issue presented in *Runyon* was controlled by the force of the Court's previous decision interpreting § 1982 as a matter of *stare decisis*:

> The [petitioners] argue principally that § 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with *Jones*' interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an[] interpretation that was reaffirmed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, and again in *Tillman v. Wheaton-Haven Recreation Assn.*, *supra*. And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct.

*Id.* at 173 (parallel citations omitted). Although *Jones* and *Sullivan* involved § 1982, the Court concluded that their holdings "necessarily require[d]" the result in *Runyon*. The Court thus established that § 1981 and § 1982 must be construed in parallel where the language at issue in each statute derives from § 1 of the 1866 Act.[7]

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[7] This Court expressly reaffirmed *Runyon* in *Patterson*. *See* 491 U.S. at 171-72, 175.

*3.* Sullivan's *holding applies with equal force to § 1982 and § 1981*

*Sullivan* held that claims for retaliation, that is, "punish[ment] for trying to vindicate the rights of minorities protected by § 1982," 396 U.S. at 237, are actionable under § 1982. In that case, petitioner Sullivan owned a house in the area of Little Hunting Park, where a homeowners group, of which Sullivan was a member, formed a non-stock corporation to operate a community park for the benefit of residents. Sullivan leased his house to an African-American man (Freeman) and, as the bylaws of the corporation allowed, sought to assign to Freeman his membership share in the corporation for the term of the lease. Because Freeman was African-American, the corporation refused to approve the assignment, and, when Sullivan protested, he was expelled from the corporation. Both Sullivan and Freeman sued. With respect to "Sullivan's expulsion for the advocacy of Freeman's cause," the Court held:

> If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. . . . [T]here can be no question but that Sullivan has standing to maintain this action.

*Id.*

This Court has recognized that *Sullivan* controls the interpretation of § 1981. *Runyon* expressly held that, with respect to § 1981 and § 1982, an interpretation of the scope of protection afforded rights in one section "necessarily requires" the same interpretation of the other section. This Court has never

contemplated that § 1981 and § 1982, with their common structure and origin in a single sentence of the 1866 Act, could be construed inconsistently.

Furthermore, the principle announced in *Sullivan* – that "punish[ment] for trying to vindicate the rights of minorities" is actionable – does not depend on whether the rights at stake are property rights or contract rights. Indeed, many property rights might easily be recharacterized as contract rights and vice versa: a lease is also a contract, as is a membership share in a corporation. Imagine if a corporation's standard employment contract required the termination of any African-American employee who exercised stock options without the permission of all white employees. Is this a discriminatory burden on the conversion of property, or a discriminatory term of employment? It is legitimately characterized as both, and a person's right to sue for being retaliated against after complaining of such a provision should not turn on the characterization. *Sullivan*'s holding certainly did not depend on describing a lease and a share in a corporation as property rights rather than contract rights. Rather, *Sullivan* relied on words shared by § 1981 and § 1982 (because of their common derivation) that prohibit discriminatory treatment, whether in contracting or property rights, and *Runyon* requires that those words be given the same construction in both statutes.

Two Terms ago in *Jackson*, the Court confirmed that the holding of *Sullivan* did not depend on any special characteristic of property rights. Rather, in the *Jackson* Court's words, *Sullivan* acknowledged the reality that, "without protection against retaliation, the underlying discrimination is perpetuated." 544 U.S. at 180 (citing *Sullivan*, 396 U.S. at 237).

Thus, upholding "Sullivan's cause of action under 42 U.S.C. § 1982 for '[retaliation] for the advocacy of [the black person's] cause,'" *id.* at 176 (quoting *Sullivan*, 396 U.S. at 237; alterations in *Jackson*), was necessary to effect the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866," *Sullivan*, 396 U.S. at 237. Indeed, as the United States argued in *Jackson*, and as the Court agreed, such protection "'would be difficult, if not impossible, to achieve if persons who complain about [race] discrimination did not have effective protection against retaliation.'" *Jackson*, 544 U.S. at 180 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 13, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672)).[8]

*4. At the time of the 1991 Act, the circuit courts unanimously recognized a cause of action for retaliation under § 1981 in reliance on* Sullivan *and* Runyon

Prior to the 1991 Act, the circuit courts repeatedly confronted the question whether § 1981, which "prohibits racial discrimination in the making and

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[8] The dissenting Justices in *Jackson* argued that *Sullivan* merely recognized "that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination." 544 U.S. at 194 (Thomas, J., dissenting). The dissent also argued that Sullivan could "make out [a] third-party claim on behalf of the black lessee" only if he could "demonstrate that the defendant had discriminated against the black lessee on the basis of race." *Id.* Even if the dissent's reading of *Sullivan* were correct – which it is not, given that *Jackson* specifically stated that "*Sullivan*'s holding was not so limited," *id.* at 176 n.1 – Humphries still would be entitled to a remand to the district court, where he would have the opportunity to prove that the discrimination of which he complained actually occurred.

enforcement of private contracts," *Runyon*, 427 U.S. at 168, covered retaliation for complaints about discrimination.[9] "The ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself," and a "person who believes he has been discriminated against because of his race should not be deterred from attempting to vindicate his rights because he fears his employer will punish him for doing so." *Goff*, 678 F.2d at 598. The circuit courts recognized that § 1981 "would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute." *Id.*; *see also Choudhury*, 735 F.2d at 43 ("We are unwilling to 'give impetus to the perpetuation' of racial discrimination by permitting an employer, with impunity, to penalize its employee for asserting rights under § 1981.") (quoting *Sullivan*, 396 U.S. at 237); *Setser*, 638 F.2d at 1146 (same).

The circuit courts also recognized that the right to be free from race-based discrimination in contracts would be hollow if individuals could be punished for speaking out against discrimination suffered by others. *See, e.g., Winston*, 558 F.2d at 1268 ("Section 1981 provides a cause of action to a White Party . . . who [was] fired . . . for protesting an asserted racially

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[9] *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) (retaliation cognizable under § 1981); *Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 43-44 (2d Cir. 1984) (same); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1229 n.15 (5th Cir. Unit B 1982) (per curiam) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (same), *vacated in part on other grounds on reh'g*, 657 F.2d 962 (8th Cir. 1981) (en banc); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same).

motivated firing of a Non-White Party."). They directly relied on *Sullivan*, where this Court held that, if a white property holder could be "punished for trying to vindicate the rights of minorities protected by § 1982," that sanction "would give impetus to the perpetuation of racial restrictions on property," as "the white owner is at times the only effective adversary of the unlawful restrictive covenant." 396 U.S. at 237 (internal quotation marks omitted); *see Winston*, 558 F.2d at 1270 ("[N]o reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981.").

Prior to *Patterson*, the circuit courts did not question whether § 1981 substantively covered post-formation conduct. Accordingly, the courts held that, under *Sullivan* and *Runyon*, § 1981 covered retaliation for complaints about discrimination, and they assumed that such actionable retaliation could occur either at or after formation of a contract. The circuit courts found it "difficult to see any reason" to "interpret the language of Section 1981 differently from the manner in which the [Supreme] Court [had] interpreted Section 1982" in *Sullivan*, especially in light of the two sections' shared "identity of historical source and similarity of language and intent." *Winston*, 558 F.2d at 1270; *see also Choudhury*, 735 F.2d at 43 n.5 (citing *Runyon* for the holding that, "[b]ecause of the related origins and language of the two sections, they are generally construed *in pari materia*").

5. Patterson *narrowed the substantive coverage of § 1981, not the scope of the private right of action*

In 1989, this Court decided *Patterson*, holding that the "to make and enforce contracts" language in

§ 1981 covered "only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process," 491 U.S. at 179-80, *not* "conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations," *id.* at 171. The Court applied this rule to conclude that § 1981 did not provide a cause of action for race-based harassment of an employee that occurred after formation of the employment contract.

This Court's narrow construction of § 1981's substantive scope led the circuit courts to hold that, under *Patterson*, retaliation claims under § 1981 were no longer cognizable *if the retaliatory conduct did not relate to the formation or enforcement of a contract*. *See Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 720 (2d Cir. 1990) (post-formation retaliatory conduct no longer actionable under § 1981 after *Patterson*); *Carter v. South Cent. Bell*, 912 F.2d 832, 838-41 (5th Cir. 1990) (same); *McKnight v. General Motors Corp.*, 908 F.2d 104, 111-12 (7th Cir. 1990) (same); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990) (per curiam) (same). At the same time, however, the lower courts recognized that *Patterson* did not cast doubt on the principle that a private right of action for retaliation existed *where the retaliation did concern the making or enforcement of a contract*. *See, e.g., Sherman*, 891 F.2d at 1535 (after *Patterson*, "an employer's retaliatory conduct falls under section 1981 only when the employer aims to prevent or discourage an employee from using legal process to enforce a specific contract right"); *McKnight*, 908 F.2d at 111 ("[r]etaliation or a threat to retaliate is a common method of deterrence, and if what is sought to be deterred is the enforcement

of a contractual right, then, we may assume, the retaliation or threat is actionable under section 1981 as interpreted in *Patterson*"). It was thus plain both before and after *Patterson* that, whatever the substantive coverage of § 1981, individuals punished for complaining about alleged violations of the statute had a private right of action for retaliation. Indeed, *Patterson* specifically reaffirmed *Runyon*'s holding that racial discrimination in private contracts may be remedied through a private right of action under § 1981. *See* 491 U.S. at 172-73 (basing its conclusion on "[c]onsiderations of *stare decisis*," which "have special force in the area of statutory interpretation").

### B. In the 1991 Act, Congress Both Overruled *Patterson* To Make § 1981 Applicable to Post-Formation Conduct and Affirmed the Cause of Action for Retaliation

Congress legislatively reversed the holding of *Patterson* by passing the 1991 Act, which added the current subsections (b) and (c) to § 1981. Subsection (b) broadly defines the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Subsection (c) provides that the "rights protected by this section are protected against impairment by nongovernmental discrimination." *Id.* § 1981(c).

This Court has acknowledged that the 1991 Act's amendments to § 1981 were enacted in direct response to *Patterson*. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) ("Other sections of the [1991] Act were obviously drafted with 'recent decisions of the Supreme Court' in mind. Thus, § 101 . . . amended the 1866 Civil Rights Act's prohibition

of racial discrimination in the 'mak[ing] and enforce[ment] [of] contracts,' 42 U.S.C. § 1981 (1988 ed., Supp. IV), in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) . . . .") (first alteration added, parallel citations omitted); *see also Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1577 (11th Cir. 1993) ("[o]ne effect of the 1991 Act . . . is to make the rule in *Patterson* obsolete").

In overruling *Patterson*, Congress did not alter the original language of § 1981 now found in subsection (a), which courts had consistently interpreted to create a private right of action for retaliation. Rather, Congress added subsection (b) broadly to define the phrase "make and enforce contracts" and to leave no doubt that the phrase substantively covered post-formation conduct. Accordingly, with respect to the cause of action under subsection (a), this case calls for application of the doctrine of ratification, under which "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well").

That doctrine is particularly relevant when Congress reenacts a statute with an implied private right of action. "When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts" – as was the case with respect to retaliation under § 1981 – "Congress need not have intended to create a new remedy, since

one already existed; the question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982); *see also Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (even under the "strict approach" dictated by *Cort v. Ash*, 422 U.S. 66 (1975), for implying causes of action, "our evaluation of congressional action . . . must take into account its contemporary legal context").

Under the doctrine of ratification, the fact that Congress did not change the statutory provision in § 1981 under which courts had uniformly implied a cause of action for retaliation, but actually defined that provision to ensure that courts would interpret its substantive reach to cover post-formation conduct, demonstrates that Congress intended to preserve the cause of action. *See Merrill Lynch*, 456 U.S. at 381-82 ("In that context [where courts had implied a private right of action], the fact that a comprehensive reexamination and significant amendment of the [Commodity Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").[10]

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[10] Congress's addition of subsection (c), codifying *Runyon*'s holding that § 1981 extended to non-governmental conduct, confirms that the 1991 Act addressed the *substantive coverage* of § 1981 while leaving the implied cause of action unaltered. In *Patterson*, the Court had called for rebriefing and reargument on the question, not presented by the parties, whether *Runyon* should be overruled. Congress's response to *Patterson* – which affected the substantive coverage of § 1981, not the existence or scope of the cause of action – was to codify the decision to uphold *Runyon* and to overrule the decision that § 1981 did not encompass post-formation conduct.

The existence of retaliation claims under § 1981 was part of the "contemporary legal context" in which Congress legislated in 1991. *Cannon*, 441 U.S. at 698-99. The legislative history of the 1991 Act confirms that lawmakers would have been aware that the courts had construed § 1981 to create a private right of action for retaliation. *See Merrill Lynch*, 456 U.S. at 378 ("In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping.")

The official report of the House Committee on Education and Labor, the committee to which the 1991 Act had been assigned, shows that lawmakers would have known that courts recognized retaliation claims under § 1981:

> In cutting back the scope of the rights to "make" and "enforce" contracts[,] *Patterson* also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. *See, e.g.*, *Overby* v. *Chevron U.S.A., Inc.*, 884 F.2d 470 (9th Cir. 1989) (affirming summary judgment against employee on claim of retaliation for protesting racial discrimination in job promotions); *Sherman* v. *Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990) (reversing award of damages in employee's favor on a claim of retaliation for filing an EEOC discrimination charge); *Malhotra* v. *Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (questioning whether rights against retaliation survive

> Supreme Court's decision in *Patterson*). Section 210 would restore rights to sue for such retaliatory conduct.

H.R. Rep. No. 102-40(I), at 92 n.92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630; *see also id.* at 92 ("The Committee finds that the Supreme Court's ruling in *Patterson* conflicts with a substantial body of federal appellate case law defining the scope of section 1981."). Thus, legislators would have been aware that, when Congress acted to extend the express coverage of the statute to post-formation conduct, it similarly restored retaliation claims based on post-formation conduct. Indeed, the House Report explicitly referred to the expectation that retaliation claims would be brought under the amended § 1981:

> Section 210 would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b). . . . The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.

*Id.* (emphasis added).

Thus, the legislative history of the 1991 Act indicates that Members of Congress understood the amendments to § 1981 as reversing *Patterson*'s holding that § 1981 did not apply to post-formation conduct, and affirming the existence of a private right of action for retaliation under § 1981. *See, e.g.*, William N. Eskridge, Jr. et al., *Legislation: Statutes and the Creation of Public Policy* 947 (3d ed. 2001) ("Most

legislation is essentially written in committee or sub-committee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.").

## II. OTHER STATUTES PROHIBITING RETALIATION, INCLUDING TITLE VII, DO NOT CAST DOUBT ON THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981

Contrary to Petitioner's assertions, neither the availability of a remedy for retaliation under Title VII, nor the enactment of express rights of action for retaliation in other statutes, supports reversing the settled interpretation of § 1981 as providing a private right of action for retaliation.

### A. Title VII Did Not Supplant or Repeal Any Portion of § 1981

Congress never intended for Title VII to supplant § 1981. "In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of [§ 1981], and that the two procedures augment each other and are not mutually exclusive.'" *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154) (first alteration in original). Indeed, Congress rejected an amendment that would have rendered § 1981 unavailable to employment discrimination plaintiffs. *See* 118 Cong. Rec. 3371-72 (1972) (statement of Sen. Williams) ("[T]o make title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the work-

ers of our country."). Congress envisioned a vital role for § 1981 in combating employment discrimination even following the enactment of Title VII. *See, e.g.*, H.R. Rep. No. 102-40(I), at 90 (describing § 1981 as "one of our nation's most important employment discrimination laws"), *reprinted in* 1991 U.S.C.C.A.N. 628; 42 U.S.C. § 1981a(b)(4) (providing that Title VII's ceiling on compensatory and punitive damages does not limit the scope of relief available under § 1981).

Section 1981, moreover, provides the only federal remedy for race-based discrimination in employment contracts for a large number of American workers. Approximately 20 percent of American employees are not covered under Title VII because their employers fall within the statutory exclusion for employers with fewer than 15 employees.[11] *See* 42 U.S.C. § 2000e(b); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 n.3 (1994) (noting that, "[e]ven in the employment context, § 1981's coverage is broader than Title VII's"). Another 5 to 30 percent of workers are not protected under Title VII because they are

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[11] The 20-percent figure is based on 2004 census data and the assumption that approximately half of the employees who work for employers with 10 to 19 employees are employees who work for employers with 10 to 14 employees. The assumption is necessary because the census tallies the number of employees who work for establishments with 1 to 4 employees, 5 to 9 employees, and 10 to 19 employees; it does not subdivide the latter category. *See* Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 Cornell L. Rev. 596, 602 n.42 (1988) (noting the EEOC's assumption that half of the employees in the latter category work for employers with 10 to 14 employees); U.S. Census Bureau, U.S. Dep't of Commerce, *County Business Patterns 2004*, at 5, Table 2 (2006), *available at* http://www.census.gov/prod/2006pubs/04cbp/cb0400a1us.pdf.

independent contractors who fall outside of the statutory definition of "employee."[12]

In any event, Petitioner's argument that the creation of a remedy for retaliation under Title VII somehow extinguished that remedy under § 1981 is inconsistent with basic principles of statutory construction, in particular the "cardinal rule . . . that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). This Court has consistently held that, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted). Petitioner and its *amici* present no justification for ignoring this long-standing clear-statement rule, especially given the clarity of Congress's intent for Title VII and § 1981 to operate together. In any event, this Court has already "held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the . . . 19th-century statute . . . now codified at 42 U.S.C. § 1981." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979).

Because Title VII and § 1981 provide independent and complementary remedies, the availability of a retaliation remedy under Title VII does not counsel against recognition of a similar remedy under § 1981.

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[12] *See, e.g., Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979); General Accounting Office, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce* 10 (June 2000), *available at* http://www.gao.gov/new.items/he00076.pdf.

### B. The Adoption of Express Private Rights of Action in Other Statutes Does Not Undermine the Implied Private Right of Action Under § 1981

Any suggestion that Congress intended to eliminate the uniformly recognized cause of action for retaliation under § 1981 because it did not enact a new provision expressly authorizing such a cause of action has no merit. In the circumstances of the 1991 amendments – unlike in circumstances where Congress drafts statutes that have not been extensively interpreted by the federal judiciary – Congress had no reason to add an explicit private right of action for retaliation, because that right was already established under existing judicial interpretation of § 1981.

As described above, when Congress amended § 1981, the circuit courts had unanimously held that § 1981 created a private right of action for retaliation. Congress's intention to ratify that uniform rule is evidenced not only by the legislative history, but also – and primarily – by Congress's decision to leave the relevant statutory language unaltered. "Congress could have made its intent clearer only by expressly providing for a private cause of action [for retaliation] in the statute. In the legal context in which Congress acted, this was unnecessary." *Merrill Lynch*, 456 U.S. at 387. For the same reason that Congress chose not to add a reference to *any* private right of action in the 1991 amendments to § 1981, it did not add an explicit reference to "retaliation." There was no reason to spell out what was clearly understood. Indeed, the 1991 amendments do not refer to "harassment," the very post-formation conduct at issue in *Patterson*. Instead of describing

in detail the categories of conduct that were actionable under § 1981, Congress reversed *Patterson*'s holding and ratified uniform circuit court precedent with respect to the scope of the private right of action.

Petitioner and its *amici* also contend that Congress's inclusion of anti-retaliation clauses in other statutes is instructive, and that, if this Court were to hold that § 1981 covers retaliation, then those provisions would somehow be rendered superfluous. That contention ignores the fundamental difference between § 1981 and modern civil rights statutes that contained anti-retaliation provisions from the start.[13] The sweeping language of § 1 of the 1866 Act reflects Congress's aim to overturn this Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), that African-Americans could not be citizens, and to protect the contract and property rights of newly freed slaves broadly and generally. The floor manager of the 1866 Act, a representative from Iowa, stated that the Act's "'end is the maintenance of freedom .... A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.'" *Jones*, 392 U.S. at 443-44 (quoting Cong. Globe, 39th Cong., 1st Sess. 1118 (1866)) (ellipsis in original).

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[13] *See, e.g.*, 42 U.S.C. § 2000e-3(a) (anti-retaliation provision in Title VII, enacted in 1964); 29 U.S.C. § 623(d) (anti-retaliation provision in Age Discrimination in Employment Act, enacted in 1967); 42 U.S.C. § 12203(a), (b) (anti-retaliation provisions in Americans with Disabilities Act, enacted in 1990); 29 U.S.C. § 2615 (anti-retaliation provision in Family and Medical Leave Act, enacted in 1993); 38 U.S.C. § 4311(b) (anti-retaliation provision in Uniformed Services Employment and Reemployment Rights Act, enacted in 1994); *see also* 29 U.S.C. § 215(a)(3) (anti-retaliation provision in Fair Labor Standards Act, enacted in 1938).

The 1866 Act was a broad and historic statement of principle, not a modern, highly reticulated statute that might be expected to list specific types of prohibited conduct like harassment and retaliation. *See generally* Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 579-90 (1989). And, by 1991, when Congress amended § 1981, the private rights of action under § 1981 were elaborated by judicial interpretation and included a cause of action for retaliation. Congress relied on that interpretation by leaving it unaltered when adopting the 1991 Act. *See Lorillard*, 434 U.S. at 580. There was no reason for Congress to do more.

Petitioner cites only one statute that Congress amended to add an explicit anti-retaliation provision – the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 158(a)(4) (anti-retaliation provision in NLRA, enacted in 1935 and amended to include anti-retaliation clause in 1947).[14] But, here again,

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[14] Petitioner also references (at 18) the "Surface Transportation Assistance Act of 1982" ("STAA") as being "amended in 1994 to protect against retaliation," citing 49 U.S.C. § 31105. In reality, the anti-retaliation provision in the STAA had existed from the statute's enactment. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (plurality) ("Section 405 [codified at 49 U.S.C. § 31105] was enacted in 1983 . . . [and] protects employee 'whistle-blowers' by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards."). In 1994, Congress passed Public Law No. 103-272 "to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, . . . and to make other technical improvements to the Code." Act of July 5, 1994, Pub. L. No. 103-272, Preamble, 108 Stat. 745, 745. The anti-

Congress acted in the *absence* of judicial construction of the statute implying a right of action for retaliation prior to its amendment. *See NLRB v. Scrivener*, 405 U.S. 117, 122-23 (1972) (explaining that the anti-retaliation provision in the NLRA "had its origin" in a predecessor statute). Congress's ratification of the judicially implied cause of action for retaliation under § 1981 is fully consistent with its inclusion of an express anti-retaliation provision in other statutes where there was no such background rule on which to rely.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 3, 2008

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retaliation provision found in § 31105 was thus recodified by Congress in 1994; it was not added to the STAA.

# APPENDIX

**Members of Congress Joining *Amicus* Brief in Support of Respondent in *CBOCS West, Inc. v. Humphries*, No. 06-1431**

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